Supreme Court, U.S.
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No. 90-1118

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1990

THE HEARST CORPORATION,

*Petitioner*,

—v.—

IOWA DEPARTMENT OF FINANCE AND REVENUE,

*Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA

## REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

James B. Weidner
(Counsel of Record)
Hilary Lane
ROGERS & WELLS
200 Park Avenue
New York, New York 10166
(212) 878-8235

*Of Counsel*:

John V. Donnelly
BROWN, WINICK, GRAVES,
DONNELLY, BASKERVILLE
AND SCHOENEBAUM
Suite 1100, Two Ruan Center
601 Locust Street
Des Moines, Iowa 50509

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This brief replies to respondent's assertion that this case does not involve the content-based classification of periodicals (Rsp. Br. 4, 6). Respondent's assertion ignores what is clear from the Iowa tax statute and the Iowa Department's implementing regulation, as well as from the undisputed record in this case.

*First*. The exemptive term, "newspaper," inherently classifies periodicals on the basis of content. Prior to promulgation of the Department's formal rule in 1981, the statutory exemption was applied pursuant to dictionary definitions which stated, for example, that a newspaper is "a paper that is printed and distributed usu. daily or weekly *and that contains news, articles of opinion, features, and advertising*"

(56a, emphasis supplied). The Department's implementing rule, promulgated in January 1981, made explicit the content-based classification already implicit in the statute. The rule provided:

> The gross receipts from the sale of newspapers, free newspapers and shoppers guides are exempt from the tax. For purposes of this rule, a newspaper is defined as a paper that is printed and distributed daily, weekly, or at some other regular and usually short interval *and that generally contains news, articles of opinion (editorials), features, advertising, or other matter regarded as of current interest. . . .*[1]

Barely a year later, the Iowa Department acted to eliminate any question that content was *always* to be a classification criterion. Announcing in February 1982 that it was deleting the word "generally" from the text of the rule as initially promulgated, the Department stated its policy:

> Subrule 18.42(1) is being amended as the present rule indicates that it is only *generally* intended that a newspaper contain news articles. Newspapers are defined by Webster's Dictionary and the Courts . . . to *always* contain articles of news.[2]

*Second.* The Department left no doubt about the importance of content when it denied the use tax exemption to the Hearst periodicals here at issue. According to the agency's decision, these periodicals were taxable because:

> The Hearst magazines contain detailed articles of special interest to a particular group of people. These magazines

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1 74a, emphasis supplied. Respondent is wrong in asserting (Rsp. Br., n.1) that Hearst did not raise any issue concerning "shoppers guides." Hearst repeatedly argued the irrationality of the Iowa statutory scheme in part precisely because of its exemption of "shoppers guides."

2 Iowa Administrative Bulletin, Vol. IV, No. 17 (Feb. 17, 1982), p. 1025; Administrative Rules Coordinator, No. 2712 (emphasis supplied).

> do not contain "news" of current events on a variety of topics of general interest. Each magazine contains feature articles in particularly narrow fields, *i.e.*, fashion, homes, furniture, outdoor recreation, boating, etc. The vast amount of non-advertising material consists of feature articles, without regard to time. The articles in the magazines were no more relevant in the month of issuance than they would be in prior or subsequent months. Unlike a newspaper, the magazines did not contain news of current interest to the general public.

56a. It was little more than an afterthought that the decision continued (*id.*):

> Unlike a newspaper, the magazines were all published monthly with the exception of one bi-monthly publication, Colonial Homes. The magazines were not in the sheet form usually found in newspapers.

*Third.* The Department conceded during the administrative proceedings below that content was the sole basis for taxation of other publications. Responding to Requests for Admission addressed to it, the Department explained for instance that *Barron's* did not qualify for the use Iowa tax exemption because:

> Barron's is a weekly periodical which contains items of special interest to investors. Barron's does not contain news on current events of general interest on a variety of topics. It is basically a trade journal directed toward investors. Accordingly, Barron's is not a newspaper.[3]

In sum, this case unquestionably involves content-tainted classification of periodicals—the sort of selective taxation this Court has found "particularly repugnant to First Amendment principles." *Arkansas Writers' Project*, 481 U.S. at 229.

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3 Department's Responses to Admission Requests and Answers to Interrogatories, No. 8A, filed by the Department on October 2, 1987, in the administrative proceedings here below.

This case comes to the Court upon a fully developed administrative and judicial record. All parties concur that the constitutional issue raised is of clear national import and the subject of direct conflict among state judiciaries. We again urge that a writ of certiorari issue to review the decision below, so that the question here presented can be expressly and definitively answered.

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Respectfully submitted,

James B. Weidner
(Counsel of Record)
Hilary Lane
ROGERS & WELLS
200 Park Avenue
New York, New York 10166
(212) 878-8235

*Of Counsel*:

John V. Donnelly
BROWN, WINICK, GRAVES,
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